NO. 42411-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE BOEING COMPANY,

Petitioner,

v.

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS BOARD, and DEPARTMENT OF ECOLOGY,

Respondents,

COOPER DEVELOPMENT ASSOCIATION, INC., THE INTERNATIONAL COPPER ASSOCIATION, LTD., OLYMPIANS FOR PUBLIC ACCOUNTABILITY, PUGET SOUNDKEEPER ALLIANCE, COLUMBIA RIVERKEEPER, and ARTHUR WEST, Appellants Below; PORT OF OLYMPIA, Respondent Below, and WEYERHAEUSER NR COMPANY, Intervenor Below.

pm 4-25-12

BRIEF OF STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

ROBERT M. MCKENNA
Attorney General

RONALD L. LAVIGNE, WSBA #18550
Senior Counsel
P.O. Box 40117
2425 Bristol Court S.W., 2nd Floor
Olympia, Washington 98504-0117
(360) 586-6751

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

The Boeing Company ("Boeing") seeks review of decisions by the Pollution Control Hearings Board ("Board") affirming the Industrial Stormwater General Permit ("Permit or ISGP") issued by the Department of Ecology ("Ecology"). Boeing argues the Permit must allow some permittees to ignore the enforceable adaptive management mechanism the legislature directed Ecology to include in the Permit. As discussed below, Boeing's argument is inconsistent with state law and would require Ecology to issue a Permit that violates the federal Clean Water Act. The Court should therefore affirm the Board's decisions on this issue.

Boeing also argues that the Permit cannot require permittees that discharge to waterbodies already polluted by too much fecal coliform bacteria to comply with the state's water quality standard for fecal coliform bacteria. As discussed below, recent legislation directs Ecology to replace the numeric effluent limit that Boeing objects to with a nonnumeric, narrative effluent limit. This legislation has made Boeing's challenge to the numeric effluent limit moot and the Court should therefore dismiss Boeing's appeal of this issue. If the Court does not dismiss Boeing's appeal on this issue, the Court should affirm the Board's decision affirming the fecal coliform numeric limit for the reasons discussed below.

II. COUNTER STATEMENT OF ISSUES

1. Did the Board err in concluding that permittees who discharge industrial stormwater that exceeds benchmark values must comply with the adaptive management requirements in the Permit in order to enjoy the presumption of compliance with water quality standards?

2. May Boeing challenge the Board's December 23, 2010 Order on Summary Judgment where the Board denied summary judgment based on material issues of disputed fact?

3. Is Boeing's appeal of the numeric effluent limit for fecal coliform discharges into waterbodies already impaired by too much fecal coliform pollution moot because the legislature has directed Ecology to replace the numeric effluent limit with a non-numeric, narrative effluent limit by July 1, 2012?

4. If the Court does not dismiss Boeing's appeal of the numeric effluent limit for fecal coliform discharges, did the Board err in concluding that the Permit properly requires compliance with the state water quality standard for fecal coliform for those permittees that discharge to waterbodies already impaired by too much fecal coliform pollution?

III. COUNTER STATEMENT OF THE CASE

A. State And Federal Water Pollution Control Laws

Ecology issued the Permit under the federal and state Water Pollution Control Acts. Ex. B-1 at 1.[1] The state Water Pollution Control Act, chapter 90.48 RCW, prohibits the discharge of any material into waters of the state that causes or tends to cause pollution of such waters. RCW 90.48.080. The Water Pollution Control Act also makes it unlawful for any person conducting a commercial or industrial operation of any type to dispose of solid or liquid waste into waters of the state without obtaining a waste discharge permit. RCW 90.48.160.

The federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251, *et seq.*, establishes the National Pollutant Discharge Elimination System ("NPDES") for permitting discharges of pollutants to navigable waters of the United States. 33 U.S.C. § 1342(a). The discharge of pollutants from point sources, including stormwater from industrial facilities, to navigable waters of the United States is unlawful except in accordance with an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(p). NPDES Permits must include both technology-based and water quality-based effluent limitations. 33 U.S.C. § 1311(b). The Clean Water Act requires states to identify waters within the state that fail to meet

[1] Exhibit B-1 is the Industrial Stormwater General Permit, it is attached as Appendix B to the Opening Brief of Petitioner The Boeing Company.

water quality standards, and to develop cleanup plans to bring the waterbodies back into compliance with water quality standards. 33 U.S.C. § 1313(d).

Congress authorized the Environmental Protection Agency ("EPA") to delegate the NPDES Permit program to states, 33 U.S.C. § 1342(b), and Ecology is designated the State Water Pollution Control Agency for all purposes of the Clean Water Act in Washington State. RCW 90.48.260. Pursuant to EPA's delegation and RCW 90.48.260, Ecology administers the NPDES program in Washington. States are prohibited from enforcing water pollution control requirements that are less stringent than Clean Water Act requirements, but may enforce water pollution control requirements that are more stringent than Clean Water Act requirements. 33 U.S.C. § 1370. Pursuant to WAC 173-226-050(3), Ecology is authorized to issue general NPDES permits to cover similar types of operations with similar waste discharges. The Industrial Stormwater General Permit is a general NPDES permit.

B. The Industrial Stormwater General Permit

Ecology issued the current ISGP on October 21, 2009, with an effective period of five years, from January 1, 2010 to January 1, 2015. CP 17, Finding of Fact ("FOF") 1. The Permit is intended to meet the requirements of both Washington's Water Pollution Control Act, and the

Clean Water Act, 33 U.S.C. § 1251, *et seq.*, as they apply to stormwater discharges from industrial facilities. Ex. B-1 at 1; WAC 173-226-010. A permittee that is covered by a general permit does not need to obtain an individual permit. WAC 173-226-020.

Ecology relied on both internal and external committees to develop the Permit. CP 18, FOF 2. The external committee included environmental and business interests as well as local government representatives. *Id.*

Discharges authorized by the Permit may not cause, have the reasonable potential to cause, or contribute to a violation of an applicable water quality standard. RCW 90.48.555(9).[2] "Compliance with water quality standards shall be presumed, unless discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to a violation of water quality standards." RCW 90.48.555(6). In order to enjoy the presumption of compliance, a permittee must be in "full compliance with all permit conditions" and "[f]ully implementing storm water best management practices contained in storm water technical manuals approved by [Ecology], or practices that are demonstrably equivalent to practices contained in storm water technical manuals

[2] Ecology "may notify" a permittee if its discharge is determined to cause, have the reasonable potential to cause, or contribute to a violation of an applicable water quality standard, and may terminate permit coverage if the violation remains or reoccurs. RCW 90.48.555(9), (10).

approved by [Ecology]." RCW 90.48.555(6)(a), (b)(i). The legislature defined the term "demonstrably equivalent" to mean that the technical basis for the selection of all storm water best management practices are documented in a stormwater pollution prevention plan that includes "[a]n assessment of how the selected practices will comply with state water quality standards." RCW 90.48.555(6)(b)(ii)(D).

One of the permit conditions a permittee must be in full compliance with in order to enjoy the presumption of compliance with water quality standards is the "adaptive management mechanism" required by RCW 90.48.555(8)(a) (the Industrial Stormwater General Permit "shall include an enforceable adaptive management mechanism" that, "at a minimum," includes benchmarks, monitoring, review and revisions to the stormwater pollution prevention plan, documentation of remedial actions, and reporting to Ecology.). "Adaptive management" is not defined in RCW 90.48.555, but the term is defined in Growth Management Act regulations as a;

> program that relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives. Management, policy, and regulatory actions are treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty.

WAC 365-195-920. *See also,* Kai N. Lee and Jody Lawrence, *Adaptive Management: Learning From The Columbia River Basin Fish and Wildlife Program*, 16 Envtl. L. 431, 442 (1986):

> Adaptive management is learning by doing: . . . .
>
> > Adaptive management is both a conceptual approach and a strategy for implementation. As a conceptual approach, it sets a scientifically sound course that does not make action dependent on extensive studies. As a strategy of implementation, adaptive management provides a framework within which measures can be evaluated systematically as they are carried out.

To implement the legislative directives in RCW 90.48.555 in a manner that complies with the Clean Water Act, Ecology developed water quality based benchmarks for a number of pollutants, including copper and zinc; and established adaptive management responses permittees must implement if industrial stormwater discharges exceed a benchmark value. A benchmark is "a pollutant concentration used as a permit threshold, below which a pollutant is considered unlikely to cause a water quality violation, and above which it may." CP 23, FOF 11.[3] Benchmarks are predictive of potential water quality violations, and, consistent with

[3] Ecology established the copper benchmark based on a sophisticated modeling exercise that evaluated the probability of exceeding the copper water quality standard. CP 32–33, FOF 24, 25. Ecology selected a copper benchmark value that "would be protective of water quality in the vast majority of conditions," but still had a ten percent probability of exceeding the acute water quality standard for copper. CP 34, FOF 26. Copper can decrease survival, growth, and reproduction of aquatic organisms, including salmonid fishes. CP 31–32, FOF 23. Boeing challenged the copper and zinc benchmarks at the Board, but has abandoned those challenges on appeal.

RCW 90.48.555(8)(a), exceeding a benchmark triggers adaptive management responses. *Id.* The adaptive management responses are identified in Condition S8 of the Permit as corrective actions. Ex. B-1 at 34–36. Different corrective actions are required based on how many times a permittee's discharge exceeds a benchmark during a calendar year. *Id.*

The Permit requires that permittees sample their discharge from each designated location at least once per quarter. Ex. B-1 at 21. Permittees that exceed a benchmark value in one quarter are required to complete a Level One Corrective Action, which requires the permittee to revise its stormwater pollution prevention plan ("SWPPP") to include additional operational source control best management practices ("BMPs") with the goal of achieving the applicable benchmark value in future discharges.[4] Ex. B-1 at 34–35. Permittees that exceed a benchmark value for a single parameter for any two quarters during a calendar year are required to complete a Level Two Corrective Action, which requires the permittee to revise its SWPPP to include additional structural source control BMPs with the goal of achieving the applicable benchmark value

[4] Operational source control BMPs are defined at Ex. B-1, p. 54, and generally include good housekeeping practices that prevent or reduce the pollution of waters of the state. Examples of operational source control BMPs include vacuum sweeping of paved surfaces to remove accumulated pollutants that could be carried away by stormwater, and keeping dumpsters closed to prevent stormwater contamination. Ex. B-1 at 16.

in future discharges. Ex. B-1 at 35.[5] Permittees that exceed a benchmark value for a single parameter for any three quarters during a calendar year are required to complete a Level Three Corrective Action, which requires the permittee to revise its SWPPP to include additional treatment BMPs with the goal of achieving the applicable benchmark value in future discharges. Ex. B-1 at 36.[6]

As the Board found, the corrective action requirements in Condition S8 of the Permit "set out a logical, increasingly stringent set of responses required of the permittee, should quarterly samples reveal continued exceedances of applicable benchmark values." CP 55–56, FOF 54. Exceeding a benchmark value is not a violation of the Permit. Rather, exceeding a benchmark value requires a permittee to implement the appropriate corrective action, which implements the legislature's directive that the Permit include an "enforceable adaptive management mechanism." RCW 90.48.555(8)(a). A permittee that exceeds a benchmark value is still entitled to the presumption of compliance with

[5] Structural source control BMPs are defined at Ex. B-1, p. 57, and include structural devices or facilities that prevent pollutants from entering stormwater. Examples of structural source control BMPs include locating industrial materials and activities inside where they are protected from stormwater, or using grading, berming, or curbing to prevent runoff of contaminated flow. Ex. B-1 at 19.

[6] Treatment BMPs are defined at Ex. B-1, p. 57, as "BMPs that are intended to remove pollutants from stormwater." An oil/water separator that removes oil and grease from stormwater is an example of a simple treatment BMP. Ex. B-1 at 20.

water quality standards so long as the permittee has implemented appropriate BMPs and is implementing the appropriate corrective action.

In this appeal, Boeing challenges the Level Three Corrective Action requirements in Condition S8.D of the Permit, and argues that this section of the Permit is unlawful to the extent it requires permittees to devise and implement BMPs other than those described in Ecology's stormwater management manuals. Opening Brief of Petitioner The Boeing Company ("Boeing Brief") at 4. Boeing also challenges the numeric effluent limit applicable to permittees who discharge into waterbodies that are already impaired by too much fecal coliform bacteria. Ecology established the numeric effluent limit for fecal coliform bacteria to comply with RCW 90.48.555(7)(a), which directs Ecology to require compliance with appropriately derived numeric effluent limits for discharges to impaired waterbodies. Boeing argues that the fecal coliform numeric effluent limit was not appropriately derived. Boeing Brief at 4–5.

C. Board Proceedings

Multiple parties appealed the Permit to the Board, but Boeing was the only permittee to proceed to hearing on its challenge to the Permit. CP 15–16. Weyerhaeuser, another permittee, intervened to defend the Permit, and its corporate environmental manager testified that the

corrective action requirements challenged by Boeing are "less complex than the last iteration" of the Permit. CP 30–31, FOF 21.

On December 23, 2010, the Board issued its Order on Summary Judgment on Puget Soundkeeper Alliance's ("PSA") Fourth Motion for Summary Judgment and concluded that none of the issues raised by PSA "can be resolved on motions, as there are material issues of disputed fact." CP 118. Accordingly, the Board denied PSA's Fourth Motion for Summary Judgment and ordered that "the issues will proceed to hearing." CP 135.

On January 5, 2011, the Board issued its Order on Summary Judgment regarding Ecology's Motion for Summary Judgment Regarding Issues Raised by Appellants Puget Soundkeeper Alliance and Boeing. In its summary judgment ruling, the Board held that the benchmarks and adaptive management requirements in the Permit are a "narrative water quality based effluent limitation designed to ensure compliance with water quality standards." CP 102. The Board held that the Permit requires permittees to "make on-going efforts to meet benchmarks as part of the adaptive management regime of the permit" and "*may* be required to install BMP's" beyond those described in Ecology approved stormwater manuals in order to achieve the water quality-based benchmark values. CP 102–03. Boeing argues that a permittee that implements appropriate

BMPs from an Ecology approved stormwater manual is entitled to the presumption of compliance with water quality standards, and does not need to comply with the corrective action requirements of the Permit, even if its discharge exceeds benchmark values. CP 83; Boeing Brief at 33.

The Board conducted a hearing on January 24 through February 3, 2011, and issued its Findings of Fact, Conclusions of Law and Order ("Board's Order") on April 25, 2011. The Board concluded that the majority of the Permit was valid and lawful, and remanded limited aspects of the permit to Ecology for modification. CP 87. In this appeal, Boeing challenges the Board's Conclusions of Law ("COL") 34, 35, 36, 8, 9 and 21. Boeing Brief at 4–5. Boeing does not assign error to any of the Board's Findings of Fact.

Conclusions of Law 34 through 36 contain the Board's analysis of the presumption of compliance in RCW 90.48.555(6) and the Board's conclusion that the presumption of compliance requires a permittee to be "in full compliance with *all permit conditions, and fully implementing stormwater best management practices* contained in stormwater technical manuals approved by Ecology (or demonstrably equivalent practices)." CP 83, COL 35. The Board went on to conclude that:

> while an exceedance of a benchmark is not, in and of itself, a violation of a water quality standard, the benchmarks are indicator values—values that are predictive of potential, or

> actual, water quality violations. A failure to meet benchmarks requires a permittee to make continued efforts to improve application and performance of BMPs. The statutory 'presumption of compliance' requires a permittee to comply with 'all permit conditions,' including those that require increasing levels of corrective actions to meet the benchmark values.

CP 84, COL 36 (citation omitted).

The Board concluded a permittee is entitled to the presumption of compliance when the permittee is:

> taking all the steps required by the adaptive management process, as modified by this opinion, or is in fact meeting benchmarks of the permit . . . . This interpretation does not convert the benchmarks into numeric effluent limitations. Rather, it implements the adaptive management response that is called for by both state and federal law.

CP 86, COL 36.

In other words, a permittee that exceeds benchmark values is still in compliance with the Permit, and still entitled to the presumption of compliance, so long as the permittee is implementing the appropriate adaptive management response to the benchmark exceedence. Boeing agrees that the presumption of compliance in RCW 90.48.555(6) requires "full compliance with all permit conditions . . . , and full implementation of all applicable and appropriate BMPs 'contained in stormwater technical manuals approved by [Ecology] . . . .' or other BMPs demonstrably equivalent to the BMPs identified in the manuals." Boeing Brief at 29–30.

However, Boeing appears to argue that once a permittee has implemented all applicable and appropriate best management practices from Ecology's Stormwater Management Manuals, the permittee can ignore the adaptive management requirements of the Permit, but still be entitled to the presumption of compliance. Boeing Brief at 34 (Board's conclusion that "all permit conditions" includes the adaptive management requirements in the Permit is "circular" and "not reasonable.").

Conclusions of Law 8, 9, and 21 reflect the Board's analysis of numeric effluent limitations applicable to discharges of pollutants to waterbodies that are already impaired by too much pollution. Boeing challenges these conclusions of law as they apply to the numeric effluent limitation for fecal coliform bacteria, and argues that the numeric effluent limit for fecal coliform bacteria was not "appropriately derived." Boeing Brief at 4–5.

IV. ARGUMENT

A. Standard And Scope Of Review

At the hearing before the Board, Boeing had the burden of proof pursuant to WAC 371-08-485(3). This Court reviews the Board's decision under the Washington Administrative Procedure Act ("APA"). *Pub. Util. Dist. 1 of Pend Oreille Cnty. v. Dep't of Ecology,* 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002); *see also* RCW 34.05.570(3). The

Court's review of the facts is confined to the record before the Board. RCW 34.05.558. The burden of demonstrating the invalidity of the Board's decision is on Boeing, the party asserting invalidity. RCW 34.05.570(1)(a). Boeing argues the Board erroneously interpreted or applied the law with respect to the presumption of compliance with water quality standards and the numeric effluent limit for fecal coliform bacteria; and that the Board's conclusion affirming the fecal coliform effluent limit is not supported by substantial evidence. Boeing Brief at 26; *see also,* RCW 34.05.570(3)(d), (e).

The Court may grant relief if it determines that the Board has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Where statutory construction is necessary, a court will interpret statutes de novo. *Pub. Util. Dist. 1,* 146 Wn.2d at 790. However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is "accorded great weight, provided it does not conflict with the statute." *Id.* In this case, Boeing seeks to reverse a decision that both Ecology and the Board agreed upon, and the Court should be "loath to override the judgment of both agencies, whose combined expertise merits substantial deference." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 600, 90 P.3d 659 (2004).

The Court may grant relief if the Board's Order is "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). The substantial evidence test is "highly deferential." *ARCO Prods. Co. v. Wash. Utilities & Transp. Comm'n,* 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order; rather, the test is whether any fair-minded person could have ruled as the Board did after considering all of the evidence. *Callecod v. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). Evidence may be "substantial" even if it is in conflict with other evidence in the record. *Id.* at 676. A reviewing court does not weigh the credibility of witnesses or substitute its judgment for the Board's with regard to findings of fact. *Bowers v. Pollution Control Hearings Bd.,* 103 Wn. App. 587, 596, 13 P.3d 1076 (2000). Additionally, any of the Board's findings left unchallenged by Boeing are verities on review. *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 674, 887 P.2d 411 (1994). Boeing has not assigned error to any of the Board's findings of fact, so all of the Board's findings of fact are verities in this appeal.

Finally, the denial of summary judgment cannot be appealed following a trial on the merits if the denial was based on a determination

that there are material facts in dispute that must be resolved by the trier of fact. *Johnson v. Rothstein,* 52 Wn. App. 303, 304–05, 759 P.2d 471 (1988). One of the decisions Boeing challenges in this appeal is the Board's December 23, 2010, Order on Summary Judgment on PSA's Fourth Motion for Summary Judgment. Boeing Brief at 3–4. However, the Board concluded that none of the issues raised by PSA in its Summary Judgment Motion "can be resolved on motions, as there are material issues of disputed fact." CP 118. Accordingly, the Board denied PSA's Fourth Motion for Summary Judgment and ordered that "the issues will proceed to hearing." *Id.* at CP 135. Consequently, the Court should not consider Boeing's challenge to the Board's December 23, 2010, Order on Summary Judgment.

B. The Board Properly Interpreted The Presumption Of Compliance In RCW 90.48.555(6)

The legislature has created a rebuttable presumption of compliance at RCW 90.48.555(6). Under this statute, compliance with water quality standards is presumed, "unless discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to violation of water quality standards." A permittee must meet two conditions to enjoy this presumption of compliance. First, the permittee must be "[i]n full compliance with all permit conditions, including

planning, sampling, monitoring, reporting, and recordkeeping conditions." RCW 90.48.555(6)(a). Second, the permittee must fully implement stormwater best management practices contained in storm water technical manuals approved by Ecology, or practices that are "demonstrably equivalent" to practices contained in Ecology approved storm water technical manuals, including the proper selection, implementation, and maintenance of all applicable and appropriate best management practices for on-site pollution control. RCW 90.48.555(6)(b)(i).

The Board properly concluded that in order to satisfy the presumption of compliance with water quality standards, a permittee must fully comply with all permit conditions *and* fully implement stormwater best management practices contained in stormwater technical manuals approved by Ecology or practices that are demonstrably equivalent to the practices in the approved manuals. CP 83, COL 35. Boeing does not appear to disagree with this interpretation of RCW 90.48.555(6). *See* Boeing Brief at 30 (arguing that under the plain meaning of RCW 90.48.555(6), "a permittee who complies with all the permit conditions and who implements all applicable and appropriate BMPs from the SWMMs is presumed to be in compliance with state water quality standards."). However, Boeing proceeds to misinterpret the Board's Order by arguing that the Board "has in effect inserted an additional precondition

[to RCW 90.48.555(6)]—that ISGP permittees meet Permit benchmarks—where it does not exist in the governing statute." Boeing Brief at 35. In fact, the Board held:

> When a permittee is taking all the steps required by the adaptive management process, as modified by this opinion, or is in fact meeting benchmarks of the permit, then the permittee is entitled to the presumption of compliance provided by the statute. This interpretation does not convert the benchmarks into numeric effluent limitations. Rather, it implements the adaptive management response that is called for by both state and federal law.

CP 86, COL 36.

The Board recognized that a permittee who exceeds the benchmarks in the Permit is still in compliance with the Permit, and still enjoys the presumption of compliance, so long as the permittee is taking all the steps required by the adaptive management process in Condition S8 of the Permit.[7] While Boeing recognizes that "full compliance with all permit conditions" is required in order to obtain the presumption of compliance, Boeing argues that the Board erred in concluding that "all permit conditions" includes Condition S8 of the Permit. Boeing Brief at 34 (arguing that interpreting "all permit conditions" to include Condition S8 of the Permit is "circular" and "not reasonable."). However, the Board properly concluded that "all permit conditions" really means all permit

[7] As discussed above, the legislature specifically directed Ecology to include "an enforceable adaptive management mechanism" in the Permit. RCW 90.48.555(8)(a).

conditions, and a permittee that exceeds a benchmark must comply with the permit conditions requiring adaptive management responses to a benchmark exceedance in order to continue enjoying the presumption of compliance.[8]

The Board's Order properly interpreted RCW 90.48.555(6), and did so in a manner that is consistent with the Clean Water Act. By contrast, Boeing's interpretation of RCW 90.48.555(6) is not only inconsistent with the statute, but is also inconsistent with the Clean Water Act. As discussed above, the Clean Water Act requires that NPDES Permits include both technology based effluent limits as well as effluent limits "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(A), (C). The legislature has recognized the need to include both technology based and water quality based effluent limits in the ISGP. RCW 90.48.555(2) ("Subject to the provisions of this section, both technology and water quality-based effluent limitations may be expressed as: . . ."). The legislature has directed Ecology to generally rely on narrative effluent limitations to satisfy the technology and water-

[8] The operative adaptive management responses for a Level Three Corrective Action are to "[m]ake appropriate revisions to the SWPPP to include additional Treatment BMPs with the goal of achieving the applicable benchmark value(s) in future discharges" and to implement the revised SWPPP "as soon as possible, but not later than September 30th the following year." Ex. B-1 at 36.

quality based requirements of the Clean Water Act. In particular, RCW 90.48.555(5) provides:

> Narrative effluent limitations requiring both the implementation of best management practices, when designed to satisfy the technology and water quality-based requirements of the federal clean water act, 33 U.S.C. Sec. 1251 et. seq, and compliance with water quality standards, shall be used for construction and industrial storm water general permits, unless the provisions of subsection (3) of this section apply.

Under state law, technology based requirements are expressed as AKART– "all, known, available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington." RCW 90.48.010. As Boeing correctly argues, the best management practices in Ecology's Stormwater Management Manuals reflect practices that are "known and available to permittees." Boeing Brief at 30–31. Thus, the requirement to implement best management practices contained in approved stormwater manuals in RCW 90.48.555(6)(b) satisfies the technology based requirements in state and federal law. The Stormwater Management Manual for Western Washington explicitly recognizes that the practices in the manual satisfy technology based requirements and that additional practices may be necessary to comply with water quality based requirements:

> Stormwater management techniques applied in accordance with this Manual are presumed to meet the technology-

based treatment requirement of State law to provide all known available and reasonable methods of treatment, prevention and control (AKART; RCW 90.52.040 and RCW 90.48.010).

This technology-based treatment requirement does not excuse any discharge from the obligation to apply additional stormwater management practices as necessary to comply with State water quality standards.[9]

Ex. B-49B at 1-7.[10]

Compliance with water quality based requirements of state and federal law is addressed by the requirement in RCW 90.48.555(6)(a) to fully comply "with all permit conditions," which includes the "enforceable adaptive management mechanism" the legislature required in RCW 90.48.555(8)(a). As discussed above, adaptive management is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty. WAC 365-195-920. An adaptive

---

[9] The Stormwater Management Manual for Western Washington recognizes its limitations with respect to compliance with water quality standards:

> Best Management Practices (BMPs) identified in this manual are necessary but sometimes insufficient measures to achieve the objective [of complying with water quality standards].
>
> ....
>
> Federal, state, and local permitting authorities with jurisdiction can require more stringent measures that are deemed necessary to meet locally established goals, state water quality standards, or other established natural resource or drainage objectives.
>
> Ex. B-49B at 1-1

[10] Exhibit B-49B is the Stormwater Management Manual for Western Washington, vol. I, it is attached as Appendix C to the Opening Brief of Petitioner The Boeing Company.

management approach is particularly well suited to ensuring compliance with water quality-based requirements applicable to industrial stormwater because industrial stormwater is more complex and variable than other wastewater discharges given the highly variable rates and volumes of industrial stormwater as well as the variability of pollutants in industrial stormwater. CP 20, FOF 6. The adaptive management mechanism in the Permit tracks the requirements the legislature established for an adaptive management mechanism in RCW 90.48.555(8)(a).

The Permit establishes benchmarks as an "adaptive management indicator" and requires permittees to monitor their discharges and compare the results to benchmark values. *Compare* Ex. B-1 at 25 (benchmarks and monitoring requirements) *with* RCW 90.48.555(8)(a)(i), (ii). Permittees are required to review and revise their stormwater pollution prevention plans in response to benchmark exceedances. *Compare* Ex. B-1 at 36 (level three corrective action includes review and revision of SWPPP) *with* RCW 90.48.555(8)(a)(iii). Finally, permittees are required to document their corrective action responses and report those responses to Ecology in the permittee's annual report. *Compare* Ex. B-1 at 36 (permittee shall sign and certify revised SWPPP) and 37 (annual report) *with* RCW 90.48.555(8)(a)(iv), (v).

Boeing's argument would eliminate the narrative water quality based effluent limits in the Permit, including the mandatory adaptive management mechanism, and grant permittees a presumption of compliance with water quality standards based solely on compliance with the technology based requirement to implement appropriate best management practices from approved stormwater manuals. Such a position is inconsistent with both RCW 90.48.555 and the Clean Water Act. This Court should affirm the Board's conclusion that the presumption of compliance in RCW 90.48.555(6) requires both full compliance with all permit conditions and full implementation of stormwater best management practices contained in approved stormwater technical manuals.

C. Recent Legislation Has Made Boeing's Challenge To The Numeric Effluent Limitation For Fecal Coliform Bacteria Moot

On March 29, 2012, Governor Gregoire signed House Bill 2651 ("HB 2651"). HB 2651, 62nd Leg., Reg. Sess. (Wash. 2012). This legislation amends RCW 90.48.555(7)(a) and directs Ecology to "require ISGP permittees with discharges to water bodies listed as impaired for bacteria to comply with nonnumeric, narrative effluent limitations."

HB 2651 at 3–4.[11] The legislation directs Ecology to implement this requirement by July 1, 2012. *Id.* at 4. The effect of this legislation is that Ecology will need to modify the ISGP by July 1, 2012, to remove the fecal coliform numeric effluent limit that Boeing challenges in this appeal and replace the numeric effluent limit with narrative effluent limitations. As Boeing notes in footnote 14 of its Brief, Ecology has recently issued a draft modification of the ISGP in response to the Board's remand in this case. In addition to responding to the Board's remand, the draft Permit modification also implements HB 2651 by removing the numeric effluent limit for fecal coliform bacteria and replacing it with a mandatory suite of best management practices.[12] HB 2651 has rendered Boeing's appeal of the numeric effluent limit for fecal coliform bacteria moot because the legislature has directed Ecology to replace the numeric limit with a nonnumeric, narrative limit by July 1, 2012, and Ecology is acting to implement that directive.

An appeal is moot where it presents purely academic issues and it is not possible for the court to provide effective relief. *Klickitat Cnty.*

---

[11] HB 2651 may be found on the legislature's website at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2651&year=2012. For the Court's convenience, a true and correct copy of HB 2651, including the Certificate of Enrollment, is attached hereto as Appendix A.

[12] The draft Permit modification may be found on Ecology's website at http://www.ecy.wa.gov/programs/wq/stormwater/industrial/index.html. For the Court's convenience a true and correct copy of a redlined version of the cover page and page 36 of the draft Permit modification is attached hereto as Appendix B.

Citizens Against Imported Waste v. Klickitat Cnty., 122 Wn.2d 619, 631, 860 P.2d 390 (1993). A moot appeal should be dismissed. *Id.* However, the Court may decide a moot appeal if it involves a question of continuing and substantial public interest. *Id.* at 632. The Court considers the following factors in deciding whether to retain a moot appeal; "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable for future guidance; (3) whether the issue is likely to recur, and (4) whether there is genuine adverseness and quality advocacy on the issue." *Id.*

The Court is unable to provide effective relief because regardless of whether Ecology "appropriately derived" the numeric effluent limit for fecal coliform bacteria, the legislature has directed Ecology to replace that numeric limit with a nonnumeric, narrative effluent limit by July 1, 2012, and Ecology is doing so. An authoritative determination as to whether Ecology "appropriately derived" the fecal coliform numeric limit is not desirable for future guidance because the derivation of other numeric effluent limits for discharges of other pollutants into impaired waterbodies will involve unique factual issues. Nor is the issue likely to recur given the legislative directive in HB 2651 and the fact that the legislation unanimously passed both houses of the legislature. *See,* Appendix A.

Accordingly, the Court should dismiss Boeing's appeal of the numeric effluent limit for fecal coliform bacteria.

D. If The Court Elects To Retain Boeing's Appeal Of The Numeric Effluent Limitation For Fecal Coliform Bacteria, The Court Should Affirm The Board's Decision That Ecology Appropriately Derived The Numeric Effluent Limitation

The presence of fecal coliform bacteria in a waterbody is a public health issue. *Lemire v. Dep't of Ecology*, PCHB No. 09-159, Order Granting Motion to Dismiss and Motion For Partial Summary Judgment, 2010 WL 4390114 (Oct. 27, 2010) at *2. Fecal coliform can deplete oxygen in a waterbody that is needed by fish and other aquatic organisms, affect the pH balance of water, and create odor problems. *Id.* Fecal coliform bacteria is one of the primary water quality problems that has led to listing some Washington waterbodies as impaired under section 303(d) of the Clean Water Act. CP 42, FOF 38. The permit establishes a numeric effluent limit for fecal coliform at the water recreation bacterial criteria (WAC 173-201A) applicable to the receiving water. *Id.*, Ex. B-1 at 32.

Boeing argues that the numeric effluent limit for fecal coliform bacteria was not "appropriately derived" pursuant to RCW 90.48.555(7)(a) because, according to Boeing, Ecology was required to conduct a "reasonable potential" analysis pursuant to RCW 90.48.555(3)(d) before

complying with the legislative mandate that Ecology require compliance with appropriately derived numeric water quality-based effluent limitations for existing discharges into impaired waterbodies. Boeing Brief at 41. The purpose of a reasonable potential analysis is to determine if a pollutant in a discharge is at a level that indicates the discharge of the pollutant will cause or contribute to a violation of a water quality standard in the receiving water for that pollutant. A waterbody is listed as impaired for a particular pollutant under section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), when the waterbody already has so much of the pollutant in the waterbody that it fails to meet water quality standards for that pollutant despite existing controls on the discharge of the pollutant. *See,* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.2(j). As the Board properly concluded in an unchallenged Conclusion of Law, RCW 90.48.555(7) "embodies the assumption that impaired water bodies do not meet water quality standards, and that further discharges will continue to contribute to such impairment." CP 71–72, COL 19.

Prior to the amendment discussed above, RCW 90.48.555(7)(a) provided:

> By November 1, 2009, the department shall modify or reissue the industrial storm water general permit to require compliance with appropriately derived numeric water quality-based effluent limitations for existing discharges to water bodies listed as impaired according to 33 U.S.C. Sec.

> 1313(d) (Sec. 303(d) of the federal clean water act, 33 U.S.C. Sec. 1251 et seq.).
>
> The legislature also directed Ecology to:
>
> report to the appropriate committees of the legislature specifying how the numeric effluent limitation in (a) of this subsection would be implemented. The report shall identify the number of dischargers to impaired water bodies and provide an assessment of anticipated compliance with the numeric effluent limitation established by (a) of this subsection.

RCW 90.48.555(7)(d).

As the Board properly concluded, RCW 90.48.555(7) "clearly and unambiguously requires Ecology to included in the ISGP 'appropriately derived' numeric water quality-based effluent limitations for discharges to 303(d)-listed water bodies." CP 71, COL 19. Boeing's argument that Ecology needed to conduct a reasonable potential analysis under RCW 90.48.555(3)(d) in order to comply with the legislative directive in RCW 90.48.555(7)(a) is inconsistent with both the statute and the basic rule of statutory construction that gives preference to a specific statute over a general statute. *Matter of Estate of Little,* 106 Wn.2d 269, 284, 721 P.2d 950 (1986).

The factors to consider in making a reasonable potential analysis are the existing controls on point and nonpoint sources, the variability of the pollutant in the stormwater discharge, and dilution of the stormwater in

the receiving water as appropriate. RCW 90.48.555(4)(a)–(c). For impaired waterbodies, the existing controls on point and nonpoint sources are insufficient to meet water quality standards in the receiving water which is why the waterbody is listed as impaired in the first place. Since the waterbody already has so much of the given pollutant that it fails to meet water quality standards for that pollutant, the waterbody has no ability to dilute discharges of that pollutant. Finally, the variability of the pollutant in the stormwater discharge is irrelevant because further discharges of the pollutant causing the impairment will continue to contribute to such impairment. Requiring Ecology to perform a reasonable potential analysis to determine if the discharge of a pollutant will cause or contribute to a violation of water quality standards in a waterbody that is already violating water quality standards for that pollutant makes no sense. The legislature did not require Ecology to perform this senseless analysis before deriving appropriate effluent limitations for discharges into impaired waterbodies.

RCW 90.48.555(7)(a) specifically deals with effluent limitations for discharges into impaired waterbodies. RCW 90.48.555(3) addresses the process Ecology uses to set effluent limits generally. RCW 90.48.555(7)(a) is the more specific statute, and clearly directs Ecology to establish appropriately derived effluent limits for discharges

into impaired waterbodies. Moreover, in RCW 90.48.555(7)(d) the legislature specifically referenced "the numeric effluent limitation established by (a) of this subsection." The legislature did not direct Ecology to develop numeric effluent limitations under RCW 90.48.555(7)(a) only if Ecology concluded such limits were necessary under RCW 90.48.555(3)(d). Instead, the legislature specifically directed Ecology to develop "appropriately derived numeric water quality-based effluent limitations for existing discharges" to impaired waterbodies. RCW 90.48.555(7)(a). The Court should affirm the Board's conclusion that Ecology appropriately derived the numeric effluent limitation for fecal coliform bacteria in the Permit.

V. CONCLUSION

For the reasons discussed above, the State of Washington, Department of Ecology respectfully requests that the Court affirm the Pollution Control Hearings Board on all issues brought in this appeal. Specifically, Ecology asks the Court to (1) affirm the Board's Order regarding the Level Three Corrective Action requirements; and (2) dismiss as moot the challenge to the numeric effluent limitation for fecal coliform bacteria in the Industrial Stormwater General Permit or, alternatively,

affirm the Board's Order regarding that limitation.

RESPECTFULLY SUBMITTED this 25th day of April, 2012.

ROBERT M. MCKENNA
Attorney General

RONALD L. LAVIGNE, WSBA #18550
Senior Counsel

Attorneys for Respondent
State of Washington,
Department of Ecology
P.O. Box 40117
Olympia, Washington 98504-0117
(360) 586-4608

APPENDICES

A. House Bill 2651, including Certification of Enrollment

B. Industrial Stormwater General Permit (Draft) cover sheet and page 36 thereof

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2651

Chapter 110, Laws of 2012

62nd Legislature
2012 Regular Session

INDUSTRIAL STORM WATER PERMITS--BACTERIA LIMITATIONS

EFFECTIVE DATE: 06/07/12

Passed by the House February 10, 2012
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate February 29, 2012
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved March 29, 2012, 1:42 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2651** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 29, 2012

Secretary of State
State of Washington

HOUSE BILL 2651

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By Representatives Springer, Chandler, Blake, Upthegrove, and Wilcox; by request of Department of Ecology

Read first time 01/20/12. Referred to Committee on Environment.

AN ACT Relating to changing the numeric limit for bacterial contamination for industrial storm water permittees with discharges to water bodies listed as impaired to a narrative limit; amending RCW 90.48.555; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 90.48.555 and 2009 c 449 s 1 are each amended to read as follows:

The provisions of this section apply to the construction and industrial storm water general permits issued by the department pursuant to the federal clean water act, 33 U.S.C. Sec. 1251 et seq., and this chapter.

(1) Effluent limitations shall be included in construction and industrial storm water general permits as required under the federal clean water act, 33 U.S.C. Sec. 1251 et seq., and its implementing regulations. In accordance with federal clean water act requirements, pollutant specific, water quality-based effluent limitations shall be included in construction and industrial storm water general permits if there is a reasonable potential to cause or contribute to an excursion of a state water quality standard.

(2) Subject to the provisions of this section, both technology and water quality-based effluent limitations may be expressed as:

(a) Numeric effluent limitations;

(b) Narrative effluent limitations; or

(c) A combination of numeric and narrative effluent discharge limitations.

(3) The department must condition storm water general permits for industrial and construction activities issued under the national pollutant discharge elimination system of the federal clean water act to require compliance with numeric effluent discharge limits when such discharges are subject to:

(a) Numeric effluent limitations established in federally adopted, industry-specific effluent guidelines;

(b) State developed, industry-specific performance-based numeric effluent limitations;

(c) Numeric effluent limitations based on a completed total maximum daily load analysis or other pollution control measures; or

(d) A determination by the department that:

(i) The discharges covered under either the construction or industrial storm water general permits have a reasonable potential to cause or contribute to violation of state water quality standards; and

(ii) Effluent limitations based on nonnumeric best management practices are not effective in achieving compliance with state water quality standards.

(4) In making a determination under subsection (3)(d) of this section, the department shall use procedures that account for:

(a) Existing controls on point and nonpoint sources of pollution;

(b) The variability of the pollutant or pollutant parameter in the storm water discharge; and

(c) As appropriate, the dilution of the storm water in the receiving waters.

(5) Narrative effluent limitations requiring both the implementation of best management practices, when designed to satisfy the technology and water quality-based requirements of the federal clean water act, 33 U.S.C. Sec. 1251 et seq., and compliance with water quality standards, shall be used for construction and industrial storm water general permits, unless the provisions of subsection (3) of this section apply.

(6) Compliance with water quality standards shall be presumed, unless discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to violation of water quality standards, when the permittee is:

(a) In full compliance with all permit conditions, including planning, sampling, monitoring, reporting, and recordkeeping conditions; and

(b)(i) Fully implementing storm water best management practices contained in storm water technical manuals approved by the department, or practices that are demonstrably equivalent to practices contained in storm water technical manuals approved by the department, including the proper selection, implementation, and maintenance of all applicable and appropriate best management practices for on-site pollution control.

(ii) For the purposes of this section, "demonstrably equivalent" means that the technical basis for the selection of all storm water best management practices are documented within a storm water pollution prevention plan. The storm water pollution prevention plan must document:

(A) The method and reasons for choosing the storm water best management practices selected;

(B) The pollutant removal performance expected from the practices selected;

(C) The technical basis supporting the performance claims for the practices selected, including any available existing data concerning field performance of the practices selected;

(D) An assessment of how the selected practices will comply with state water quality standards; and

(E) An assessment of how the selected practices will satisfy both applicable federal technology-based treatment requirements and state requirements to use all known, available, and reasonable methods of prevention, control, and treatment.

(7)(a) By November 1, 2009, <u>except for discharges identified in (b) of this subsection,</u> the department shall modify or reissue the industrial storm water general permit to require compliance with appropriately derived numeric water quality-based effluent limitations for existing discharges to water bodies listed as impaired according to 33 U.S.C. Sec. 1313(d) (Sec. 303(d) of the federal clean water act, 33 U.S.C. Sec. 1251 et seq.).

(b) For pollutants other than bacteria, the industrial storm water general permit must require permittees to comply with appropriately derived numeric water quality-based effluent limitations in the permit, as described in (a) of this subsection, by no later than six months after the effective date of the modified or reissued industrial storm water general permit. By July 1, 2012, the industrial storm water general permit must require permittees with discharges to water bodies listed as impaired for bacteria to comply with nonnumeric, narrative effluent limitations.

(c) For permittees that the department determines are unable to comply with the numeric water quality-based effluent limitations required by (a) of this subsection, within the timeline established in (b) of this subsection, the department shall establish a compliance schedule as follows:

(i) Any compliance schedule provided by the department must require compliance as soon as possible, and must require compliance by no later than twenty-four months, or two complete wet seasons, after the effective date of the industrial storm water general permit. For purposes of this subsection (7)(c)(i), "wet seasons" means October 1st through June 30th.

(ii) The department shall post on its web site the name, location, industrial storm water permit number, and the reason for requesting a compliance schedule for each permittee who requests a compliance schedule according to this subsection (7)(c). The department shall post this information no later than thirty days after receiving a permittee's request for a compliance schedule under this subsection (7)(c). The department shall also prepare a list of organizations and individuals seeking to be notified when such requests for compliance schedules are made, and notify them within thirty days after receiving a permittee's request for a compliance schedule. Notification under this subsection may be accomplished electronically.

(d) The department shall report to the appropriate committees of the legislature specifying how the numeric effluent limitation in (a) of this subsection would be implemented. The report shall identify the number of dischargers to impaired water bodies and provide an assessment of anticipated compliance with the numeric effluent limitation established by (a) of this subsection.

(8)(a) Construction and industrial storm water general permits issued by the department shall include an enforceable adaptive management mechanism that includes appropriate monitoring, evaluation, and reporting. The adaptive management mechanism shall include elements designed to result in permit compliance and shall include, at a minimum, the following elements:

(i) An adaptive management indicator, such as monitoring benchmarks;

(ii) Monitoring;

(iii) Review and revisions to the storm water pollution prevention plan;

(iv) Documentation of remedial actions taken; and

(v) Reporting to the department.

(b) Construction and industrial storm water general permits issued by the department also shall include the timing and mechanisms for implementation of treatment best management practices.

(9) Construction and industrial storm water discharges authorized under general permits must not cause or have the reasonable potential to cause or contribute to a violation of an applicable water quality standard. Where a discharge has already been authorized under a national pollutant discharge elimination system storm water permit and it is later determined to cause or have the reasonable potential to cause or contribute to the violation of an applicable water quality standard, the department may notify the permittee of such a violation.

(10) Once notified by the department of a determination of reasonable potential to cause or contribute to the violation of an applicable water quality standard, the permittee must take all necessary actions to ensure future discharges do not cause or contribute to the violation of a water quality standard and document those actions in the storm water pollution prevention plan and a report timely submitted to the department. If violations remain or recur, coverage under the construction or industrial storm water general permits may be terminated by the department, and an alternative general permit or individual permit may be issued. Compliance with the requirements of this subsection does not preclude any enforcement activity provided by the federal clean water act, 33 U.S.C. Sec. 1251 et seq., for the underlying violation.

(11) Receiving water sampling shall not be a requirement of an industrial or construction storm water general permit except to the extent that it can be conducted without endangering the health and safety of persons conducting the sampling.

(12) The department may authorize mixing zones only in compliance with and after making determinations mandated by the procedural and substantive requirements of applicable laws and regulations.

NEW SECTION. **Sec. 2.** Section 1 of this act expires January 1, 2015.

Passed by the House February 10, 2012.
Passed by the Senate February 29, 2012.
Approved by the Governor March 29, 2012.
Filed in Office of Secretary of State March 29, 2012.

Issuance Date: October 21, 2009
Effective Date: January 1, 2010
Expiration Date: January 1, 2015

Modification Issuance Date:
Modification Effective Date:

DRAFT

INDUSTRIAL STORMWATER GENERAL PERMIT

A National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for Stormwater Discharges Associated With Industrial Activities

State of Washington
Department of Ecology
Olympia, Washington 98504-7600

In compliance with the provisions of
The State of Washington Water Pollution Control Law
Chapter 90.48 Revised Code of Washington
and
The Federal Water Pollution Control Act
(The Clean Water Act)
Title 33 United States Code, Section 1251 et seq.

Until this permit expires, is modified or revoked, Permittees that have properly obtained coverage under this general permit are authorized to discharge in accordance with the special and general conditions which follow.

Kelly Susewind, P.E., P.G. Manager
Water Quality Program
Washington State Department of Ecology

Table 5: Sampling and Effluent Limits Applicable to Discharges to 303(d)-listed Waters

Parameter	Units	Effluent Limit		Analytical Method [a]	Laboratory Quantitation Level [b]	Sampling Frequency
		Fresh Water	Marine			
Turbidity	NTUs	25	25	EPA 180.1 Meter	0.5	1/quarter [c]
pH	SU	[i]	Between 7.0 and 8.5	Meter [d]	±0.5	1/quarter [c]
Fecal Coliform Bacteria	# colonies/ 100 mL	[h]	[h]	SM 9222D	20 CFU/ 100 mL	1/quarter [c]
TSS [e]	mg/L	30	30	SM2540-D	5	1/quarter [c]
Phosphorus, Total	mg/L	[f]	[f]	EPA 365.1	0.01	1/quarter [c]
Ammonia, total as N	mg/L	[f]	[f]	SM 4500 NH^3-GH	0.3	1/quarter [c]
Copper, Total	µg/L	[f]	[f]	EPA 200.8	2.0	1/quarter [c]
Lead, Total	µg/L	[f]	[f]	EPA 200.8	0.5	1/quarter [c]
Mercury, Total	µg/L	2.1	1.8	EPA1631E	0.0005	1/quarter [c]
Zinc, Total	µg/L	[f]	[f]	EPA 200.8	2.5	1/quarter [c]
Pentachlorophenol	µg/L	9[g]	[f]	EPA 625	1.0	1/quarter [c]

[a] Or other equivalent method with the same reporting level.

[b] The Permittee shall ensure laboratory results comply with the *quantitation level* specified in the table.

[c] 1/quarter means 1 sample taken each quarter, e.g., Q1 = Jan 1 – March 31st, Q2 = April 1 – June 30th, etc.

[d] Permittees shall use either a calibrated pH meter consistent with *EPA* 9040 or an approved state method.

[e] A Permittee who discharges to a water body *303(d)-listed* for any *sediment* quality parameter shall sample the *discharge* for TSS.

[f] Site-specific effluent limitation will be assigned at the time of permit coverage.

[g] Based on a pH of 7.0.

[h] A numeric effluent limit does not apply, but permittees must sample according to Table 5. In addition, ~~T~~the following ~~effluent limit~~mandatory BMPs shall be incorporated into the SWPPP and implemented:

1) Use all known, available and reasonable methods to prevent rodents, birds, and other animals from feeding/nesting/roosting at the facility;

2) Perform at least one annual dry weather inspection of the stormwater system to identify and eliminate sanitary sewer cross-connections;

3) Install effective structural source control BMPs to address on-site activities and sources that could cause bacterial contamination (e.g., dumpsters, compost piles, food waste, animal products, etc.);

4) Implement effective operational source control BMPs to eliminate any known sources of fecal coliform bacteria (e.g., animal waste, etc.);

5) Additional bacteria-related sampling and/or BMPs, if ordered by Ecology on a case-by-case basis. ~~is the water recreation bacteria criteria (WAC 173-201A) applicable to the receiving waterbody.~~

[i] The effluent limit for a Permittee who discharges to a fresh water body *303(d)-listed* for pH is: Between 6.0 and 8.5, if the 303(d)-listing is for high pH only; Between 6.5 and 9.0, if the 303(d)-listing is for low pH only; and Between 6.5 and 8.5 if the 303(d)-listing is for both low and high pH. All pH effluent limits are applied end-of-pipe.